Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

WILLIAM HARRY BRINK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a prisoner/informant acting as an undercover government agent for Sixth Amendment purposes when he obtains information from pretrial detainees while expecting and receiving favorable sentencing treatment, when the informant has a well established history of informing for the FBI and other law enforcement agencies in exchange for favorable treatment, has been trained to obtain information from fellow inmates, and further, has been moved from prison to prison by the government to enable him to obtain information?

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William Harry Brink respectfully petitions for a Writ of Certiorari to review the Judgment Order of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App., *infra*, 16a-35a) is reported at 39 F.3d 419 (3rd Cir. 1994).

STATEMENT OF JURISDICTION

The Court of Appeals entered its Judgment Order on November 3, 1995, (App., *infra*, 1a-3a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.C.A. Const. Amend. 6.

STATEMENT OF THE CASE

A. Statement of the Procedural History

The Petitioner, William Harry Brink (hereinafter "Petitioner Brink"), was convicted of bank robbery, armed bank robbery and use of a firearm during a crime of violence on May 25, 1993, in the United States District Court for the Western District of Pennsylvania. (App., *infra*, 46a). The District Court had jurisdiction of this criminal matter under 18 U.S.C.A. § 3231, pertaining to offenses against the laws of the United States. Petitioner Brink filed a Motion for a New Trial, alleging that the trial judge erred in failing to suppress the testimony of an undercover agent/informant named Ronald Scott. The trial judge, the Honorable Alan N. Bloch, entered an Order denying the Petitioner's Motion for New Trial on June 8, 1993. (App., *infra*, 45a). The District Court entered judgment and sentence on July 30, 1993. (App., *infra*, 38-44a).

Petitioner Brink appealed his conviction to the United States Court of Appeals for the Third Circuit, alleging that his Sixth Amendment right to counsel had been violated when an undercover government agent deliberately elicited incriminating statements from him. On October 27, 1994, the Court of Appeals vacated the District Court's judgment and remanded the case to the District Court for an evidentiary hearing to determine, first, if the informant was an undercover government agent, and second, if the informant deliberately elicited statements from Petitioner Brink. (App., *infra*, 36a-37a).

On remand, the trial court held two evidentiary hearings on the Sixth Amendment issue. On March 6, 1995, the District Court issued Findings of Fact and Conclusions of Law, determining that the informant was not a government agent at the time of his jailhouse conversations with Petitioner Brink and, further, that

the informant did not deliberately elicit information from Petitioner Brink. Thus, the District Court concluded that Petitioner Brink's Sixth Amendment right to counsel was not violated. (App., *infra*, 4a-15a).

Petitioner Brink appealed the District Court's decision to the United States Court of Appeals for the Third Circuit. On November 3, 1995, the Third Circuit entered a judgment order affirming the District Court's judgment. (App., *infra*, 1a-3a).

B. Statement of the Facts

Petitioner Brink was convicted of robbing Farmer's National Bank in East Brady, Pennsylvania, on December 16, 1992. At the Petitioner's trial, the government introduced the testimony of Ronald L. Scott. Ronald Scott testified that he was a cellmate of Petitioner Brink at the Clarion County Prison where Petitioner Brink was a pretrial detainee. He testified that Petitioner admitted to him that he (Brink) had robbed Farmer's National Bank and, further, that Petitioner Brink had talked to him about his alibi defenses. At the time of these conversations, Alexander H. Lindsay, Jr., Esquire, had already been retained to represent Petitioner Brink.

At the time that the informant, Ronald Scott (hereinafter "Scott"), encountered Petitioner Brink as a pre-trial detainee, Scott had a long history of working as a jailhouse informant for both the federal and state governments. In early 1991, Scott requested to speak with both the FBI and Pennsylvania State Police regarding various crimes. The FBI and Pennsylvania State Police consented and, during this interview, Scott requested, among other things, a reduction in his prison sentence. The FBI agents promised Scott that any cooperation he gave them would be brought to the attention of the Pennsylvania Attorney General and the Unites States Attorney. In 1993, after

Scott had met with authorities and after Petitioner Brink was convicted, Scott's cooperation with law enforcement authorities was brought to the attention of the Pennsylvania Common Pleas Court at a hearing which resulted in a substantial reduction in Scott's sentence.

Once this relationship between Scott and law enforcement officials was formed, the informant, Scott, began informing on fellow inmates at various prisons. Scott testified that in order to gain a fellow inmate's trust and obtain information from him, Scott lied to them and give them false cover stories. Scott also testified that law enforcement authorities were aware of this fact.

On September 26, 1991 and September 30, 1991, prior to Scott's contact with Petitioner Brink, Scott was advised by an FBI agent that he was an agent of the government. The informant, Scott, was instructed as to what information he could elicit or relate to law enforcement authorities. For the next two and one-half years, Scott continued a pattern of informing upon cellmates and meeting with various law enforcement agencies.

The informant, Scott, was moved among several prisons for his own protection due to the fact that he was an informant and, according to Scott, for the convenience of law enforcement authorities so he could "work the area."

After Scott had been advised that he was an agent of the government, and after he had begun informing on cellmates at various prisons as he moved about the prison system, the informant, Scott, was placed in the same cell as Petitioner Brink. This was soon after the Christmas of 1992. There was no evidence that state or federal authorities had deliberately placed Scott in the same cell as Petitioner Brink. There is also no evidence that the informant was specifically instructed by state or federal authorities to obtain information from Petitioner Brink.

Scott was approached by a state trooper working the Brink case. Scott testified that he was reluctant to provide information to this state trooper until the state trooper was able to demonstrate that he was aware of the fact that Scott had been cooperating with the government.

The informant, Scott, testified that he took Petitioner Brink "under his wing" once they became cellmates. Scott also testified that Petitioner Brink felt like he (Brink) was under Scott's wing because Scott was a fellow prisoner and had been in the prison system for some time. Scott testified that, after a few days, Petitioner Brink began to confide in him. The informant, Scott, stated that he and Petitioner Brink discussed all aspects of Petitioner Brink's case. In fact, Scott testified that he had advised Petitioner Brink how to deal with specific items of evidence against him and had also advised Petitioner Brink that he thought Brink was guilty.

Petitioner Brink testified at the evidentiary hearing that the informant, Scott, kept bringing up the bank robbery in conversations with Brink and would not let Petitioner Brink drop the subject. Scott also questioned Petitioner Brink about his alibi defense and went so far as to advise Petitioner Brink that he should plead guilty.

Informant Scott eventually testified at Petitioner Brink's trial and Petitioner Brink was convicted.

In 1993, after Petitioner Brink's trial and conviction, the informant, Scott, petitioned the Court of Common Pleas of Allegheny County, Pennsylvania, under the Post-Conviction Relief Act. At this hearing, an FBI agent testified on behalf of Scott, setting forth his cooperation with law enforcement, including his work on the Brink case. As a result of this hearing, the informant, Scott, received a substantial reduction in sentence and was immediately paroled.

REASONS FOR GRANTING THE WRIT

SUMMARY

Brink's Petition for a Writ of Certiorari should be granted because the United States Court of Appeals for the Third Circuit has decided an important question of federal law that has not been, but should be, addressed by this Court. Furthermore, the Court of Appeal's decision in this case conflicts with a decision by the Court of Appeals for the Seventh Circuit.

The Court of Appeals, by affirming the District Court's judgment, has decided that a jailhouse informant is not a government agent when he trolls through various prisons for information from random inmates even though the government made him an official agent in the past, promised him a reward for his cooperation, met with him repeatedly to discuss the information he obtained on his "reconnaissance missions" and played an instrumental role in getting the informant's sentence reduced based upon his informant activities.

The informant's testimony should not have been admitted because it was obtained in violation of Petitioner Brink's Sixth Amendment right to counsel. The informant was an undisclosed government agent at the time he deliberately elicited these incriminating statements from Petitioner Brink, thus violating Brink's Sixth Amendment right to counsel. *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980); *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964).

At the time the informant allegedly obtained this information from Petitioner Brink, the informant had an established relationship as an undercover agent for the government and had been instructed on the proper procedures for

obtaining information as an undercover agent. He had a history of informing on his cellmates, commencing in 1991 and continuing, at least, until he received a sentence reduction in 1993. During this time, the informant was moved from prison to prison, both for his own protection and, in the informant's words, so he could "work the area." He obtained these statements from Petitioner Brink in the interim, between the time he was made an official agent and the time he received his sentence reduction.

It violates the Sixth Amendment and vitiates the protections afforded by *Massiah* and *Henry* to hold that an informant with this established history of working as an undercover government informant is not an agent simply because the government did not specifically instruct the informant to obtain information from Petitioner Brink or have an agreement about obtaining information from Petitioner Brink. It is illusory to characterize the informant as not being a government agent because he acted voluntarily. To some degree, all informants act voluntarily. The question is whether the informant was acting at the bequest of or on behalf of the government. Clearly, the informant in this matter was acting with at least the constructive, if not actual, knowledge of the government and on the government's behalf. This is evidenced by the fact that the government "trolled" the informant through the prison system and met with him on a continuing basis to discuss any new information he had acquired. The informant's actions in gathering information from Petitioner Brink clearly fits within a pattern of conduct evidencing a symbiotic relationship between the government and the informant, thereby making the informant a government agent.

I.

THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT, BUT SHOULD BE, SETTLED BY THIS COURT WHEN IT DETERMINED THAT A PRETRIAL DETAINEE'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS NOT VIOLATED BY A JAILHOUSE INFORMANT "TROLLING" THROUGH THE PRISON SYSTEM.

This case is a case of first impression for this Court. The issue is whether a pre-trial detainee's Sixth Amendment right to counsel is violated when the detainee is imprisoned with and questioned by an informant who is "trolling" through the prison system looking for information. More specifically, the issue is whether the informant is considered a government agent even though the informant was not given instructions to obtain information on a specific prisoner. If it is necessary for a lawyer to be present for an interrogation of a pre-trial detainee by a police officer, how much more vital is it for counsel to be present during interrogation of a pre-trial detainee by a jailhouse informant, a convicted criminal acting as a government agent?

The role of counsel at interrogation goes far beyond advising the defendant concerning whether to answer or not answer questions. The lawyer is there to observe the context and substance of the questions asked and the answers given. He can object to the misleading questions, bullying tactics and trickery. Without the presence of the lawyer at interrogation, the fact finder is left with the recollection and interpretation of a criminal who has every motive to put whatever spin on the interrogation which will aid his cause, which cause is to curry favor with the government. We would never allow such a situation if the interrogator were a law enforcement officer, but the lower

court's ruling in this case encourages the use of jailhouse informants trolling through pre-trial detention centers to do just that.

The magnitude of the Sixth Amendment right to counsel was recognized by this Court in *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964). In *Massiah*, this Court held that the right to counsel applies to all critical stages of the proceedings against a defendant. This Court went on to expound upon the idea that the most critical period of criminal justice proceedings may be from the time of arraignment until the beginning of trial, when consultation with legal counsel, investigation and preparation are vitally important, and the accused has as much a right to counsel during that period as at the trial itself.

This Court's holding in *Massiah* was expanded in *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980). The *Henry* Court held that incriminating statements made by a defendant, after indictment and while in jail, to a fellow inmate who was an undisclosed, paid government informant were inadmissible because the statements were obtained in violation of his Sixth Amendment right to counsel.

In *Henry*, this Court set forth three factors that are to be considered when determining whether the government deliberately elicited statements from a defendant. These factors are whether: (1) the informant acted under instructions as a paid informant for the government; (2) the informant appeared to be just another inmate; and (3) the defendant was in custody at the time the informant engaged him in conversations. *United States v. Henry*, 447 U.S. at 270. According to the Court of Appeals, in the present case the only questions are "whether Scott was acting as a government agent when he got Brink to tell him about the crime and whether that information was elicited deliberately."

United States v. Brink, 39 F.3d 419, 423 (3rd Cir. 1994) (App., *infra*, 24a).

For the purposes of this Petition, a "troller" is an inmate who is moved from prison to prison, be it to gather information or for his own protection due to his informant activities, and who obtains information from inmates, including pre-trial detainees with whom he happens to come in contact. In the instant case, the informant was declared by the FBI to be a government agent and was instructed in the proper procedures for obtaining information from fellow inmates. The informant had been promised that his cooperation would be brought to the attention of the authorities, including the United States Attorney's Office. The informant then commenced a pattern of informing on various cellmates as he was transferred from prison to prison. From 1991 through 1993, Scott provided authorities with between ten to fifty items of information.

The informant, Scott, was incarcerated with Petitioner Brink a little more than a year after Scott was officially made an agent of the government and commenced to elicit information from Brink in the absence of counsel. Less than one year after Petitioner Brink was convicted, the informant, Scott, received a substantial sentence reduction of six years at a Post-Conviction Relief hearing. Scott's cooperation with the government, including his informant activities in the Brink case, was the pivotal reason for this sentence reduction.

We will assume for the sake of argument that Scott, like the informant in *Henry*, was placed in the cell with Petitioner Brink by pure happenstance, although the Court of Appeals questioned whether it was by happenstance that Scott was placed in the same cell as Petitioner Brink, a pretrial detainee, when the government knew of his informant activities. (App., *infra*, 26a). What differentiates the "trolling informant" in *Brink* from the

informant in *Henry* is that the government did not have a specific conversation with Scott about informing on Petitioner Brink before Scott obtained the statements from Petitioner Brink. According to the Court of Appeals and District Court, this fact is conclusive evidence that the informant was not acting as a government agent, but rather was acting voluntarily. In other words, if the government and the informant, Scott, did not have an agreement under which Scott was to obtain specific information or information from targeted persons, then Scott could not have been an undercover agent.

It is respectfully suggested that the Court of Appeals' decision fails to address the realities of the situation, and this Court therefore needs to decide this issue. Regardless of whether or not he was instructed to gather information on a specific inmate, the fact remains that Scott was made a government agent in 1991 and was promised that his cooperation would be brought to the attention of the United States Attorney's office. At first, he was given instructions regarding specific individuals, but once his work on those cases was done, he continued with his informant activities with the knowledge and consent of the government. Law enforcement authorities continued to meet with him and accept his cooperation. The government also enabled him to carry on his activities by moving him from prison to prison to meet new prisoners.

It is vital to note that while Scott was informing on cellmates from 1991 through 1993, he knew he had been promised that his cooperation would be brought to the attention of the authorities, and further, that he had not yet had his sentence reduction hearing. Thus, he was informing on these random inmates with an eye towards prospective relief from his sentence.

This Court must address the government's practice of moving informants among the prison system to troll for

information if the Sixth Amendment is to have any real import and apply equally to all citizens. The importance of the Sixth Amendment right to counsel was elucidated in *Massiah v. United States, supra,* in which this Court stated, "[T]he Constitution, which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.' " (*Id.,* 84 S. Ct. 1202) (citations omitted).

Thus, *Massiah* recognized the important role lawyers play in all aspects of criminal proceedings, including pretrial preparation. Nowhere is it more vital for an attorney to be present than when the accused is being interrogated by the government, not just to prevent the accused from incriminating himself, but, more importantly, to observe and record the questions asked and answers given. If the attorney is deprived of the opportunity to observe the interrogation, then he is unable to effectively rebut or deal with it.

It is clear from the plethora of case law that the government cannot interrogate pre-trial detainees. In *United States v. Henry, supra,* this Court explained that an incarcerated defendant is subject to unique psychological inducements to reach for aid and support from his fellow inmates. Furthermore, confinement may bring into play subtle influences that will make a defendant particularly susceptible to the ploys of undercover government agents. Thus, when the government uses an undercover government informant to intentionally create a situation likely to induce the accused to make incriminating statements without the assistance of counsel, the government violates the accused's Sixth Amendment right to counsel. *Id.*

The Court of Appeals' decision that informants are not to be considered government agents where they are merely on a reconnaissance mission looking for information for the government, and are not on specific orders from the government to talk to certain prisoners, emasculates *Massiah* and *Henry*. It permits the government to violate the Sixth Amendment rights of those pre-trial detainees unfortunate enough to come into contact with the trolling informant.

The extent of constitutional protection afforded an accused then becomes dependent upon the financial resources of the accused. If the accused is solvent and able to make bail, then he will not be detained pre-trial and is not subject to the possibility of coming into contact with a troller. On the other hand, an accused who is not able to make bail and is detained pre-trial is vulnerable to being interrogated by a trolling undercover government informant. Thus, the Court of Appeals' decision effectively affords Sixth Amendment protection against interrogation by informants to those persons who can afford to pay bail, but not to those who cannot.

The Sixth Amendment imposes upon the government an affirmative obligation not to act in a manner that circumvents or dilutes the protection afforded by the right to counsel. *Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). The *Massiah* Court stated, "[I]f the Sixth Amendment right to counsel is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." *Massiah*, 84 S. Ct. at 1203 (citations omitted). The *Massiah* Court went on to opine that the accused, Massiah, was more seriously imposed upon because he did not know that he was under interrogation by a government agent when speaking to the informant. To permit the government to use informants to troll through the system looking for information which they then "voluntarily" give to the government, with the reasonable

expectation of reward, absolutely contradicts the protections enumerated in *Massiah* and *Henry*. The fact that the government may or may not have targeted a specific individual is of no consequence. The result is the same; the prisoner is interrogated without counsel by someone trying to assist the government.

In considering this matter, this Court should be mindful of the fact that when the informant encountered Petitioner Brink, he was not a novice who had never before informed for the government or who was new to the criminal justice system. He was a seasoned informant who "knew the ropes." He had been trained by the government in how to question an inmate and what rules and regulations to follow. He knew how to lie to and manipulate Petitioner Brink to gain his confidence and what questions to ask to get the information he wanted. This is precisely the type of surreptitious interrogation against which the Sixth Amendment is designed to protect.

II.

BY DECIDING THAT AN ACCUSED'S SIXTH AMENDMENT RIGHT TO COUNSEL IS NOT VIOLATED BY THE USE OF "TROLLING" INFORMANTS IN THE PRISON SYSTEM, THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED A DECISION IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN *UNITED STATES V. YORK*.

It is respectfully suggested that the Court of Appeals for the Third Circuit's decision in this case is in direct conflict with the Court of Appeals for the Seventh Circuit's decision in *United States v. York*, 933 F.2d 1343 (7th Cir. 1991).

In *York*, the defendant, York, contended that his Sixth

Amendment rights had been violated when a cellmate testified as to incriminating statements made by York. The informant had never been directed to get information from York or from any one else in the prison. However, the informant had been a government agent in the past and had an informal agreement with the government that the government would assist in his parole application by detailing his cooperation with the government. The government insisted that any rewards or payments the informant received were not connected to his testimony in the *York* case, but rather, were for his other informant activities. Clearly, the facts of the *York* case are very close to those of this Petitioner's case.

The Court of Appeals for the Seventh Circuit held that York's Sixth Amendment rights had been violated. The *York* court pointed out that an informant is not so much a government agent as an entrepreneur who hopes to sell information when the informant gains information without the government's direction. However, the *York* court went on to state that the government cannot send an informant on a reconnaissance patrol through the prison population to gather evidence, citing with approval the rationale in *United States v. Sampol,* 636 F.2d 612 (D.C. Cir. 1980), in which case the court held that where there is a prearrangement between the government and an informant, the informant is a government agent. "Whether the principal exercises its control strictly, by targeting specific individuals, or casually, by loosing an informant on the prison population at large, is irrelevant. 'It is the ability to control, whether exercised or unexercised, that indicates agency relationship.' " *York, supra* at 1357 (citations omitted).

The District Court in *York* found that the informant was not a government agent because he was under no general direction as to how to proceed. The Court of Appeals, in reversing the District Court's decision, stated, "We agree with the view of the facts, but

must respectfully disagree as to their legal significance. There is no question that the FBI was not closely managing [the informant's] actions in prison; the relevant question, however, is whether the FBI told [the informant] to collect information, not whether it told him exactly *how* or *when* to collect it, or from *whom*." Id. at 1358.

The *York* court concluded as a matter of law that the informant was a government agent, finding that an agreement existed between the informant and the government despite the government's contentions to the contrary. The *York* court recognized that agreements between the government and an informant do not have to be explicit or formal, but may be inferred from the behavior of the parties over a sustained period of time.

The *York* court opined that any alternative explanation for the informant's continuing activities is implausible. The court stated, "[The informant's] work for the government put him at risk in the midst of several prison populations, groups not well known for their hospitality toward government informants. [The informant] knew this quite well; he had been transferred to different prisons several times for his own safety. . . . It seems unlikely that [the informant] would have been willing to assume such risks over a prolonged period of time simply on the hope that the government would treat him charitably . . . ." *Id.* at 1358.

The informant in Petitioner Brink's case occupied a position very similar, in fact almost identical, to that of the informant in *York*. Therefore, the Court of Appeals' decision that the informant in *Brink* was not a government agent is in direct contravention of the Court of Appeals' decision in *United States v. York*.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED NOVEMBER 3, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-3171

UNITED STATES OF AMERICA

v.

WILLIAM HARRY BRINK,

Appellant

On Appeal from the United States District Court
For the Western District of Pennsylvania
(Criminal Action No. 93-cr-00035)
District Judge: Honorable Alan N. Bloch

Argued: October 26, 1995

BEFORE: STAPLETON, McKEE and GIBSON,*
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit:

1. Whether, upon plenary review, the lower court erred in

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* Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

finding that the informant, Ronald Lynn Scott, was not acting as an undercover government agent when he obtained statements from the defendant, when Scott testified that he had a history of informing for the F.B.I., had been moved from prison to prison for the purpose of obtaining information, had been instructed as to how to obtain information as a jailhouse informant, and had received favorable sentencing treatment in exchange for informing; and

2. Whether, upon plenary review, the lower court erred in finding that the informant, Ronald Lynn Scott, did not deliberately elicit statements from the defendant when he purposely lied to defendant to gain his trust and discussed the specific aspects of defendant's case, even encouraging him to plead to the crime;

IT IS ORDERED AND ADJUDGED that the judgment of the district court entered March 6, 1995, be and the same is hereby affirmed.

By the Court,

s/ Walter K. Stapleton
Circuit Judge

ATTEST:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: NOV 03 1995

Appendix A

Certified as a true copy and issued in lieu of a formal mandate on November 27, 1995.

Teste: s/ P. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED MARCH 6, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 93-35

UNITED STATES OF AMERICA

vs.

WILLIAM HARRY BRINK,

Defendant.

ORDER

AND NOW, this 6th day of March, 1995, the judgment of conviction and sentence in the above captioned matter having been vacated by the United States Court of Appeals for the Third Circuit, and the case having been remanded for a hearing to determine whether statements made by the defendant and introduced into evidence at defendant's trial were obtained in violation of the defendant's right to counsel under the Sixth Amendment to the United States Constitution; and

This Court having conducted evidentiary hearings on this issue on January 6, 1995, and January 27, 1995; and

The Court having found that the statements in question were not obtained in violation of the defendant's Sixth Amendment right to counsel; and

Appendix B

In accordance with the Court's Findings of Fact and Conclusions of Law issued herewith,

IT IS HEREBY ORDERED that the judgment of conviction and sentence imposed on July 30, 1993 is REINSTATED.

s/ Alan N. Bloch
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 93-35

UNITED STATES OF AMERICA

vs.

WILLIAM HARRY BRINK,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On June 2, 1993, a jury convicted defendant, William Harry Brink, of bank robbery, armed bank robbery, and use of a firearm during a crime of violence. Defendant appealed his conviction asserting that the government had violated his Sixth Amendment right to counsel by placing him in a jail cell with a police informant who deliberately attempted to elicit incriminating statements from him.

On October 27, 1994, the Court of Appeals for the Third Circuit vacated defendant's conviction and remanded his case to this Court for a determination of whether the government had in fact violated defendant's Sixth Amendment rights. *United States v. Brink,* 39 F.3d 419, 420 (3d Cir. 1994). This Court heard evidence on this issue on January 6, 1995, and January 27, 1995. As set forth below, this Court finds that no Sixth Amendment violation has occurred in this case.

Appendix B

Findings of Fact

1. In 1989, Ronald Scott was imprisoned in a state penal institution pursuant to criminal sentences imposed by courts of the Commonwealth of Pennsylvania. (Trial transcript (tr.), 19-20; Evidentiary Hearing I (EH-I), 27-28).

2. In late 1990 or early 1991, Scott decided to become a police informant. (Tr. 33; EH-I 33, 47).

3. Scott became an informant in the hope that his actions would lead to a reduction in his original sentences. (EH-I, 44-45).

4. Law enforcement officials told Scott that they could not promise him that he would receive a reduced sentence as a result of his cooperation as an informant. (Tr., 21; EH-I, 44, 49; Sentencing hearing, 12).

5. Law enforcement officials did, however, inform Scott that the extent of his cooperation would be brought to the attention of the Pennsylvania Attorney General and the United States Attorney. (Tr., 34-35; EH-I, 44).

6. Scott was housed in a number of different jails because his activities as an informant put his life at risk. (Tr., 31; EH-I, 56-57).

7. Scott provided inculpatory information to state law enforcement officials about two of his fellow inmates at Huntingdon County Jail in or about 1991. (Tr., 33-35; EH-I, 67).

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8. In 1991, Scott told prison guards that two of his fellow inmates at Butler County Jail were planning to escape from prison. (EH-I, 50-52).

9. In June, 1991, Scott met with state and federal law enforcement officials concerning his possible cooperation in federal burglary investigations. (EH-I, 40-43, 48, 64).

10. Federal law enforcement officials had no contact with Scott regarding the burglary investigations after September, 1991, because the state government needed Scott's cooperation in an attempted murder investigation of Larry Bonetti, Sr. (EH-I, 40, 71-72; Evidentiary Hearing II (EH-II), 87-88; Sweeney letter, 3-12-92, 2-4).

11. Scott had gained information regarding the state's attempted murder investigation because in 1991, while Scott and Bonetti were cellmates at Butler County Jail, Bonetti informed Scott that Bonetti planned to kill both an assistant Pennsylvania attorney general and Frank Bonetti. (EH-I, 40-43; EH-II, 83).

12. Scott ultimately testified against Bonetti at a suppression hearing. (EH-I, 41).

13. Scott provided information to state law enforcement officials regarding various drug matters in late 1991. (EH-I, 53-54).

14. Although Scott informed on his fellow inmates, no state or federal law enforcement official ever instructed Scott to question the inmates with whom Scott was imprisoned. (EH-I, 58, 61).

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Defendant's pretrial detention with Scott

15. On November 23, 1992, Scott was transferred to Clarion County Jail for his protection. (EH-I, 56-57).

16. Pennsylvania State Trooper William Felmlee arrested defendant for bank robbery on December 26, 1992. (EH-II, 93).

17. Defendant was arraigned on the day of his arrest and was transported to Clarion County Jail. (EH-I, 3-4, 79).

18. Rules of criminal procedure required that defendant be imprisoned in Clarion County Jail, the jail in the county of his arrest. (EH-II, 93).

19. Clarion County Jail has only one cell block and is not equipped to segregate prisoners. (EH-I, 79-80).

20. The warden of Clarion County Jail placed defendant in a cell with Scott in accordance with normal jailhouse procedures; law enforcement officials did not instruct or request the warden to house defendant with Scott. (EH-I, 79; EH-II, 93).

21. While Scott and defendant were cellmates, Scott advised defendant not to discuss defendant's case with anyone. (Tr., 23; EH-I, 60).

22. Scott did not seek out defendant in an attempt to gain inculpatory information from him. (EH-I, 60).

23. Defendant initiated incriminating conversations with

Scott concerning the bank robbery. (EH-I, 60, 6-10, 16, 18, 22).

24. Defendant confessed to Scott that he had committed the bank robbery within a week of the date that they became cellmates. (Tr., 26, 34).

25. Scott did not contact state or federal law enforcement officials after defendant made the inculpatory statements regarding the bank robbery. (EH-I, 60).

26. In January and February, 1993, Trooper Felmlee was investigating defendant's bank robbery. (EH-II, 93-94).

27. Trooper Felmlee's standard operating procedures required him to interview individuals, such as cellmates and ex-girlfriends, with whom defendant may have discussed his criminal activities. (EH-II, 94-95).

28. On February 6, 1993, Trooper Felmlee interviewed Scott at Clarion County Jail as part of his routine investigation of defendant's bank robbery. (EH-II, 94-95).

29. Before the interview, Trooper Felmlee was not aware that Scott had previously acted as a police informant. (EH-II, 95-96).

30. At the time of the interview, Trooper Felmlee was not certain that defendant had made incriminating statements to Scott, but Trooper Felmlee's past experience had demonstrated that when inmates such as defendant are incarcerated for the first time, the inmates have a tendency to try to impress their cellmates with the crimes that they have committed. (EH-II, 95).

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31. During the interview, Trooper Felmlee asked Scott whether defendant had made any incriminating statements regarding the bank robbery. (EH-II, 96).

32. Scott initially refused to discuss defendant's case but, eventually, he voluntarily informed Trooper Felmlee of defendant's inculpatory remarks. (EH-I, 60-61; EH-II, 97-98).

33. After the interview, Trooper Felmlee did not encourage Scott to obtain any additional incriminating information from defendant. (EH-II, 98).

34. Scott was transferred from Clarion County Jail approximately one week after his interview with Trooper Felmlee. (Tr., 21; EH-I, 61, 80; EH-II, 97).

35. Scott testified at defendant's trial that while they were cellmates, defendant had confessed to committing the bank robbery. (Tr., 26, 39).

36. Defendant made the incriminating remarks about which Scott testified prior to Scott's interview with Trooper Felmlee. (Tr., 39-40).

37. A jury convicted defendant of bank robbery and related crimes on June 2, 1993.

38. On August 31, 1993, approximately 2-1/2 years after Scott began acting as an informant, Scott received a reduction in his original sentence after a federal law enforcement official testified at a sentencing hearing that Scott had cooperated as an informant in various cases, including defendant's. (Sentencing transcript, 9-15; EH-II, 72-74).

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39. In sum, although Scott had previously acted as a government informant prior to his incarceration with defendant, Scott's decision to inform against defendant was not related to his prior activities as an informant. The government did not intentionally place Scott in defendant's cell in an attempt to gain inculpatory information, and Scott did not seek out incriminating information from defendant. Rather, defendant initiated the incriminating conversations with Scott.

Conclusions of Law

1. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel." U.S. Const. Amend. 6.

2. The Sixth Amendment imposes an affirmative obligation upon the government not to solicit incriminating statements from a defendant in the absence of his counsel. *See, e.g., Maine v. Moulton,* 474 U.S. 159, 171 (1985); *Massiah v. United States,* 377 U.S. 201, 206 (1964).

3. The government's use of a "jailhouse informant" to obtain incriminating statements from a defendant violates the defendant's Sixth Amendment rights if: (1) the defendant's right to counsel had attached at the time of the incriminating conversations; (2) the informant acted as a government agent when obtaining the incriminating information; and (3) the informant "deliberately elicited" the incriminating statements from the defendant. *See, e.g., United States v. Henry,* 447 U.S. 264, 270 (1980); *Brink,* 39 F.3d at 421-24; *accord United States v. Johnson,* 4 F.3d 904, 910 (10th Cir. 1993), *cert. denied,* 114 S.Ct. 1081 (1994). The defendant bears the burden

of proving these three factors. *See Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986); *Depree v. Thomas*, 946 F.2d 784, 793 (11th Cir. 1991).

4. The Sixth Amendment right to counsel attaches at the initiation of adversarial judicial proceedings whether by way of formal charge, preliminary hearing, indictment, information or arraignment. *Moulton*, 474 U.S. at 176; *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

5. A jailhouse informant is a government agent if the informant and the government have an express or implied agreement under which the informant provides information in exchange for a reward from the government. *Brink*, 39 F.3d at 423-24; *Johnson*, 4 F.3d at 910; *Depree*, 946 F.2d at 794. While an express agreement is easily determined, an implicit agreement is more difficult to establish but exists where an informant provides information "on the reasonable assumption that government officials [are] aware of his actions and [will] reward him in the future with a recommendation for a reduction in sentence." *Brink*, 39 F.3d at 424.

6. The fact that the government bestows a benefit on an informant after the informant provides information is evidence that a prior agreement existed between the informant and the government, but it is not conclusive. *See Johnson*, 4 F.3d at 910.

7. "An inmate who voluntarily furnishes information without instruction from the government is not a government agent, even if the informant had been an agent in the past." *Brink*, 39 F.3d at 423; *United States v. Van Scoy*, 654 F.2d 257,

260 (3d Cir.), *cert. denied,* 454 U.S. 1126 (1981); *accord United States v. Watson,* 894 F.2d 1345, 1347-48 (D.C. Cir. 1990).

8. An informant "deliberately elicits" information when the informant takes "some action, beyond merely listening, that [i]s designed to elicit incriminating remarks" from the defendant. *Kuhlmann,* 477 U.S. at 459.

9. "[T]he Sixth Amendment is not violated whenever -- by luck or happenstance -- the State obtains incriminating statements from the accused after the right to counsel has attached[]. . . ." *Id.*

10. Defendant's right to counsel had attached at the time of the incriminating conversations between himself and Scott.

11. Scott was not acting as a government agent at the time of his jailhouse conversations with defendant because Scott and the government did not have an express or implicit agreement under which Scott would provide information in exchange for a reward from the government; Scott voluntarily provided the incriminating information to the government.

12. Scott did not "deliberately elicit" information from defendant because he did not take affirmative steps designed to elicit incriminating remarks from defendant.[1]

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1. At this Court's evidentiary hearing on January 6, 1995, defendant denied making inculpatory statements to Scott. (EH-I, 7, 11, 14). Thus, defendant's assertion that Scott "deliberately elicited" incriminating statements from him appears inconsistent with his own testimony.

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Conclusion

The facts of this case demonstrate that Scott neither acted as a government agent at the time of defendant's incriminating remarks nor deliberately elicited inculpatory information from defendant. The government did not intentionally place Scott in defendant's cell in an attempt to obtain incriminating information from him in the absence of his counsel. As a result, the government did not violate defendant's Sixth Amendment right to counsel, and defendant is not entitled to a new trial.

An appropriate Order will be issued.

Date: 3/6/95

s/ Alan N. Bloch
United States District Judge

cc: Counsel of record.

cc: Asst. U.S. Atty. Bruce Teitelbaum
633 U.S. Post Office & Courthouse, Pittsburgh, PA 15219

Alexander Lindsay, Jr., Esquire
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APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED OCTOBER 27, 1994

Filed October 27, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3397

UNITED STATES OF AMERICA

v.

WILLIAM HARRY BRINK,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Criminal No. 93-00035)

Argued April 13, 1994

Before: BECKER, MANSMANN and SCIRICA,
Circuit Judges

(Filed October 27, 1994)

Appendix C

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OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

William Harry Brink appeals his conviction for bank robbery. Brink contends the government violated his Sixth Amendment right to counsel by placing him in a cell with a known informant in a deliberate attempt to elicit self-incriminating statements. He also contends the district court erred by allowing him to introduce an eyewitness' prior identification only for impeachment purposes, rather than as substantive evidence. Although Brink has made a colorable Sixth Amendment claim the record before us is inadequate to resolve it because the district court denied Brink's request for an evidentiary hearing. Therefore, we will vacate the

judgment of conviction and sentence and remand for an evidentiary hearing to decide that issue.

I. Facts and Procedure

On December 16, 1992, a masked gunman robbed the Farmers National Bank in East Brady, Pennsylvania and stole $4,434.00 in cash. Brink was arrested for the crime and charged with bank robbery, 18 U.S.C. § 2113(a) (1988); armed bank robbery, *id.* § 2113(d); and use of a firearm in a crime of violence, *id.* § 924(c).

Before trial, Brink was confined to Clarion County prison where he shared a cell with Ronald Scott. After learning Scott was scheduled to testify at his trial, Brink discovered Scott had been an informant for the Pennsylvania State Police and the Federal Bureau of Investigations on five previous occasions. Brink requested a pre-trial evidentiary hearing to determine Scott's involvement with the State Police and the FBI. The court denied Brink's motion. At trial, Scott testified that, while in Clarion County prison, Brink confessed to committing the bank robbery and admitted to manufacturing an alibi.

The principal eyewitnesses at trial were Annette Miller and Marilyn Ann Simpson, two bank tellers on duty at the time of the robbery, who identified Brink as the robber after testifying that they knew him both as a customer and from prior associations. They based their identifications on the visible parts of his face, his mannerisms and his voice. Miller stated that although she got a good look at his eyes, she could not remember what color they were. An FBI agent, however,

testified that the day after the robbery, Miller told him the robber had dark eyes.[1]

The prosecution also introduced photographs taken by bank surveillance cameras,[2] testimony that Brink had been seen with stacks of money the night after the robbery, and evidence that $220 was found in the sofa of a house where Brink had been doing construction work during the week of the robbery.[3]

In defense, Brink offered the testimony of John Olcus, his neighbor, and Natalie Reefer, a mail carrier. Olcus testified that he saw Brink at his house at or near the time of the robbery.[4] Reefer, who did not know Brink but was standing with Olcus when a car drove up to Brink's home around the time of the robbery, testified that she saw a red Subaru drive up to Brink's house and that Olcus told her Brink was the driver.

A jury found Brink guilty on all three counts. Brink filed a

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1. Brink has light hazel eyes.

2. The pictures taken were inconclusive as to the robbers identity.

3. Two FBI expert witnesses also testified. A photography expert testified to five similar features between the denim jacket worn by the robber in the surveillance photographs and a jacket obtained from Brink's home. A firearms expert testified that the gun in the photographs was a revolver, as was the gun obtained from Brink's home. Both experts stated they could not positively identify the objects in the photographs as the objects in evidence.

4. Brink's house is approximated 4 1/2 miles from Farmers National Bank. Olcus testified it would take at least 10 minutes to drive from the bank to Brink's house.

motion for a new trial, which the court denied. This timely appeal followed. We have jurisdiction under 28 U.S.C. § 1291 (1988).

II. Right to Counsel

Over objection, Brink's pre-trial cellmate, Ronald Scott, testified that, while in Clarion County prison, Brink told him that he robbed the Farmers National Bank and how he devised an alibi. Brink contends the government violated his Sixth Amendment right to counsel by placing him in a cell with Scott because, he claims, Scott was a government agent deliberately attempting to elicit incriminating evidence outside the presence of Brink's counsel. We apply plenary review to the district court's application of legal precepts, *see Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1370 (3d Cir.), *cert. denied*, 498 U.S. 899 (1990), and clearly erroneous review to its factual findings, *see United States v. Kim*, 27 F.3d 947, 958 (3d Cir. 1994); *Monachelli v. Warden, SCI Graterford*, 884 F.2d 749, 750 (3d Cir. 1989).

The deliberate use of jailhouse informants to elicit incriminating information may violate a defendant's right to counsel. *United States v. Henry*, 447 U.S. 264, 274 (1980); *see also Massiah v. United States*, 377 U.S. 201, 206 (1964). In *Massiah v. United States*, the Supreme Court held the government violates a prisoner's Sixth Amendment right to counsel when it uses, as evidence, statements made by the defendant "which [it] had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.* at 206. Massiah, a merchant seamen, had been charged with various narcotics offenses. *Id.* at 202. After release on bail, Massiah met with Colson, a codefendant, in Colson's parked

car where, unbeknownst to Massiah, Colson had allowed government agents to install a radio transmitter under the front seat. *Id.* at 202-03. During the course of their meeting, an FBI agent overheard Massiah make incriminating statements, which the agent later recounted at trial. On appeal, Massiah maintained that use of the radio transmitter was an illegal search under the Fourth Amendment and that admission of the agent's testimony violated his rights under the Fifth and Sixth Amendments by forcing him to incriminate himself and by interrogating him outside the presence of his attorney. *Id.* at 203-04. Without reaching his other arguments, the Court agreed with Massiah on the Sixth Amendment claim. Noting that the Constitution guarantees the right to counsel as much during the period between arraignment and trial as during the trial itself, the Court stated, " 'if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. [M]assiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent.' " *Id.* at 206 (quoting *United States v. Massiah,* 307 F.2d 62, 72-73 (2d Cir. 1962) (Hays, J., dissenting)).

In *United States v. Henry,* the Court reaffirmed the principles of *Massiah* on facts similar to this case. Like here, the defendant in a bank robbery prosecution challenged the admission of his pre-trial cellmate's testimony on the grounds that the cellmate was a government agent. 447 U.S. at 265. Even though the informant was given specific instructions not to question Henry about his case, the Court found the government had in fact "deliberately elicited" the information from Henry, stating, "[e]ven if the agent's statement that he did not intend that [the informant] would take affirmative

steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result." *Id.* at 271. Consequently, the Court found that the government violated Henry's right to counsel by "intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel." *Id.* at 274; *see also Maine v. Moulton,* 474 U.S. 159 (1985) (right to counsel violated where codefendant, as government agent, meets with defendant and discusses crime, even though defendant, not government, requested meeting).

Massiah and *Henry* establish that the government violates a pre-trial detainee's right to counsel when it deliberately creates a situation in which a prisoner is likely to make incriminating statements, *Henry,* 447 U.S. at 274, and deliberately uses an informant to elicit information from the prisoner, *Massiah,* 447 U.S. at 269. But the Court stopped short of excluding all incriminating statements reported by jailhouse informants, and "left open the question whether the Sixth Amendment forbids admission in evidence of an accused's statements to a jailhouse informant who was 'placed in close proximity but [made] no effort to stimulate conversations about the crime charged.' " *Kuhlmann v. Wilson,* 477 U.S. 436, 456 (1986) (quoting *Henry,* 447 U.S. at 271 n.9) (alteration in *Kuhlmann*).

In *Kuhlmann v. Wilson,* the Court held that where a prisoner makes incriminating statements to a passive listener — a "listening post" — the introduction of the prisoner's statements does not violate his right to counsel because the informant's presence does not constitute an interrogation. 477 U.S. at 459 (primary concern of *Massiah* line of decisions is secret interrogation with techniques equivalent to direct-

police interrogation). In that case, the defendant and two accomplices robbed a taxicab garage and murdered the night dispatcher. *Id.* at 438-39. After arraignment, Kuhlmann was held in detention and placed in a cell with Lee, a police informant, who had agreed to aid the police in getting information about Kuhlmann's accomplices. *Id.* at 439. Lee had been expressly instructed not to ask Kuhlmann any questions about his case, but instead to "keep his ears open." *Id.* Although Kuhlmann never divulged the names of his accomplices, he admitted to committing the crime to Lee who reported it to the police. The state trial court expressly found that Lee did not elicit statements from Kuhlmann and that Kuhlmann's statements were "spontaneous" and "unsolicited." *Id.* at 440. Kuhlmann was then convicted by a jury. After unsuccessful appeals in the state court system and unsuccessful petitions for federal habeas corpus, the Supreme Court handed down its opinion in *Henry* whereupon Kuhlmann renewed his petition for federal habeas corpus. After a divided panel of the United States Court of Appeals for the Second Circuit granted Kuhlmann's petition, *id* .at 441-43, the Supreme Court reversed. Noting the presumption of correctness that must be afforded the trial court's factual finding, *id.* at 460, the Court held that introduction of Kuhlmann's self-incriminating statements did not violate his right to counsel because his spontaneous statements were not the result of an interrogation, *id.* at 459.

Henry and *Kuhlmann* set the bounds for using a prisoner's self-incriminating statements made to jailhouse informants. The government violates a prisoner's right to counsel when it places that prisoner in a cell with a jailhouse informant who "deliberately use[s] his position to secure incriminating information from [the defendant] when counsel was not

present." *Henry*, 447 U.S. at 270. But it does not violate a prisoner's rights where "by luck or happenstance — the State obtains incriminating statements from the accused after the right to counsel has attached." *Kuhlmann*, 477 U.S. at 459.

In finding the government deliberately elicited statements from the defendant in *Henry*, the Court found three factors to be significant: (1) the informant acted under instructions as a paid informant for the government;[5] (2) the informant appeared to be just another inmate; and (3) the defendant was in custody at the time the informant engaged him in conversations. 447 U.S. at 270. Because Scott presented himself as just another inmate and Brink was in custody the second and third factors are evident here. The only questions are whether Scott was acting as a government agent when he got Brink to tell him about the crime and whether that information was elicited deliberately.

In this case, even though Scott maintains he was not instructed to question Brink about the robbery, there is some evidence that Scott deliberately elicited information from Brink.[6] On this record, however, it is unclear whether Scott

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5. Although the Supreme Court emphasized the fact that the informant was "paid", 447 U.S. at 270 & n.7 we do not understand the Court to imply that only informants who receive cash are "paid informants." Instead, we believe the Court meant that any informant who is offered money, benefits, preferential treatment, or some future consideration, including, but not limited, to a reduction in sentence, in exchange for eliciting information is a paid informant.

6. The district court did not make a finding on whether Scott elicited information from Brink, but there is a colorable claim that Scott may have been more than just a listening post. On cross-examination, at trial, Scott admitted that when acting as a government agent his method of obtaining information was

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was acting as a government agent while sharing Brink's cell. An inmate who voluntarily furnishes information without instruction from the government is not a government agent, even if the informant had been an agent in the past. *See United States v. Van Scoy,* 654 F.2d 257, 260 (3d Cir.), *cert. denied,* 454 U.S. 1126 (1981). Because Scott admitted acting as a government agent in other cases,[7] but denied receiving any promises or rewards for informing on Brink, he may fall within this category.

But the record also contains evidence suggesting that Scott may have had a tacit agreement with the government. Scott testified that he began informing in the hopes of having his sentence reduced. The government trained him as an informant and at one point a government agent told Scott that his cooperation would be reported to the United States Attorney and the Attorney General.[8] Therefore, Scott may have informed on Brink on the reasonable assumption that government officials were aware of his actions and would reward him in the future, if not presently, with a recommendation for a reduction in his sentence.

(Cont'd)
to lie to his cellmates to gain their trust. Scott admitted lying to Brink, and acknowledged he had gained Brink's trust. Scott also discussed Brink's case with him, telling Brink he thought Brink was guilty, and even discussed the possibility of Brink escaping during a break in the trial.

7. Scott admitted to volunteering to be a government informant in 1990 or 1991. Since then he has informed on at least six inmates in three jails or prisons.

8. This case is unlike *Van Scoy,* where the informant did not receive any favorable treatment from the FBI, 654 F.2d at 260, since the government honored Scott's request to be placed in the witness protection program after he testified against a cellmate in an earlier trial.

It is also significant that after Scott began informing, the government placed him in a cell with a pretrial detainee. Scott testified that a state trooper approached him while he was sharing a cell with Brink to ask if Brink had given Scott any information about the crime. Since the government was aware of Scott's propensity to inform on his cellmates, we believe that placing him in a cell with a pretrial detainee could represent a deliberate effort to obtain incriminating information from a prisoner in violation of his Sixth Amendment right to counsel. *Cf. Henry*, 447 U.S. at 271 (government presumed to have known that placing informant in a cell with pretrial detainee would lead to informant taking affirmative steps to get incriminating statements).

We believe Brink has raised a colorable claim that the government violated his constitutional right to counsel by placing him in a cell with a known informant who may have been acting as a government agent. In these instances, the trial court should conduct an evidentiary hearing and make the necessary findings since such conduct, if proven, could violate a defendant's rights under the Sixth Amendment.[9]

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9. "Most constitutional errors have been held amenable to harmless-error analysis." *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2081 (1993). Because the erroneous admission of a coerced confession does not automatically warrant a new trial, *see Milton v. Wainwright*, 407 U.S. 371, 377-78 (1972); *see also Arizona v. Fulminante*, 499 U.S. 279, 311 (1991) (Opinion of Rehnquist, C.J., for the Court), the district court judgment would stand if admitting Brink's confession was harmless beyond a reasonable doubt, *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also Fulminante*, 499 U.S. at 295-96. We find, however, that the admission of Brink's confession, if error, was not harmless. When reviewing constitutional violations for harmless error our inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial

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Because the district court declined to hold an evidentiary hearing, we will vacate the judgment of conviction and sentence and remand for a hearing to determine whether Brink's rights under the Sixth Amendment were violated. Should the district court make this determination, Brink will be entitled to a new trial.

III. Prior Identification

At trial, bank teller Annette Miller testified she was unable to recall the bank robber's eye color. FBI Agent McEachern testified that the day after the robbery, Miller told him the bank robber had dark colored eyes. Brink, whose eyes are light hazel, sought to use Miller's prior statement as substantive evidence of his innocence, but the court refused and instead gave the following instruction:

> You will recall that certain witnesses who testified during the trial had made statements before this trial about matters at issue in this case. These earlier statements were brought to your attention to help you decide if you believe that witness' testimony. You cannot use these earlier statements as evidence in this case.

Brink contends the district court erred because Federal

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was surely unattributable to the error." *Sullivan*, 113 S. Ct. at 2081. On this record we hold the guilty verdict was not surely unattributable to the introduction of Brink's confession, and therefore was not harmless. *Cf. Fulminante*, 499 U.S. at 296-302 (admission of coerced confession was not harmless despite admission of a second, lawfully-obtained confession and other circumstantial evidence).

Appendix C

Rule of Evidence 801(d)(1)(C) allows statements of prior identification to be admitted as substantive evidence.

a.

At the outset we must determine the proper scope of review. The government contends our review should be for plain error. Generally, we review evidentiary rulings for abuse of discretion, *see, e.g., In re Merritt Logan, Inc.*, 901 F.2d 349, 359 (3d Cir. 1990), but when no objection is made at trial we review for plain error only. *See Government of Virgin Islands v. Smith*, 949 F.2d 677, 681 (3d Cir. 1991); *United States v. Castro*, 776 F.2d 1118, 1128 (3d Cir. 1985), *cert. denied*, 475 U.S. 1029 (1986).[10] This rule gives the court an opportunity to correct any mistakes before charging the jury, *Santos*, 932 F.2d at 251; *United States v. Chicarelli*, 445 F.2d 1111, 1115 (3d Cir. 1971) (quoting *United States v. Provenzano*, 334 F.2d 678, 690 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964)), and prevents the appellant from purposely failing to object in the hopes of later asserting the court's error as the basis for a new trial, *Chicarelli*, 445 F.2d at 1116 (quoting *United States v. Grosso*, 358 F.2d 154, 158 (3d Cir. 1966), *rev'd on other grounds*, 390 U.S. 62 (1968)).

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10. The plain error doctrine "is intended to correct errors that are 'obvious' or that otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.' " *Government of Virgin Islands v. Charleswell*, 24 F.3d 571, 576 (3d Cir. 1994) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). The doctrine provides for correction of a mistake "so 'plain' the trial judge [was] derelict in countenancing it, even absent the defendant's timely" objection. *United States v. Frady*, 456 U.S. 152, 163 (1982); *see also Government of Virgin Islands v. Knight*, 989 F.2d 619, 631-32 (3d Cir.), *cert. denied*, 114 S. Ct. 556 (1993); *United States v. Santos*, 932 F.2d 244, 251 (3d Cir.), *cert. denied*, 112 S. Ct. 592 (1991).

Brink challenged the instruction, stating, "With regard to identification, we believe that under the federal rules it is not hearsay." The government maintains Brink's statement was not specific enough to constitute an objection. We disagree. Although Brink did not mention Rule 801(d)(1)(C) expressly, his objection was sufficiently specific to inform the district court. *Cf. Santos*, 932 F.2d at 250-51 (finding appellant's statement "I object to the refusal to charge points 1 through 6 of defendant's proposed points of charge" too general to alert district court to the specific objection raised on appeal); *see also United States v. Castro*, 776 F.2d 1118, 1129 (3d Cir. 1985). Because Brink's challenge put the district court on notice of the issue now raised on appeal, we review the district court ruling for abuse of discretion.

b.

The Federal Rules of Evidence provide "A statement is not hearsay if . . . one of identification of a person made after perceiving the person." Fed. R. Evid. 801(d)(1)(C) (West 1994). Statements of prior identification are admitted as substantive evidence because of "the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions." Fed. R. Evid. 801, Notes of Advisory Committee on 1972 Proposed Rules; *see* S. Rep. No. 199, 94th Cong., 1st Sess. 2 (1975) ("Both experience and psychological studies suggest that identifications consisting of nonsuggestive lineups, photographic spreads, or similar identifications, made reasonably soon after the offense, are [more] reliable than in-court identifications."). "Admitting these prior identifications therefore provides greater fairness to both the prosecution and the defense in a criminal trial." *Id.*

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Generally, evidence is admitted under Rule 801(d)(1)(C) when a witness has identified the defendant in a lineup or photospread, but forgets, or changes, his testimony at trial. *See, e.g., United States v. O'Malley,* 796 F.2d 891, 898-99 (7th Cir. 1986); *United States v. Jarrad,* 754 F.2d 1451, 1456 (9th Cir.), *cert. denied,* 474 U.S. 830 (1985). Although less common, Miller's "exculpatory" prior identification falls within the rule. The rule's plain language does not exclude exculpatory statements, nor can we find any reason to distrust the reliability of this kind of identification.

Moreover, the fact that FBI agent McEachern, rather than Miller, recited Miller's statement at trial does not preclude introducing her statement as substantive evidence. Debate on the 1975 amendment to the Rule demonstrates Congress was aware that third parties would testify to the witness's prior statements. *See* 121 Cong. Rec. 31,867 (1975) (statement of Rep. Hungate) ("The bill . . . applies to situations where an eyewitness has previously identified a person out of court. It would admit into evidence testimony of that identification. For example, testimony by a police officer that at a lineup John Doe identified the defendant as the man who robbed his store."). *See generally* Jack B. Weinstein and Margaret A. Berger, Weinstein's Evidence, ¶ 801(d)(1)(C)[01], at 801-222 (1993) ("If at trial the eyewitness fails to remember or denies that he made the identification, the previous statements of the eyewitness can be proved by the testimony of a person to whom the statement was made, and the statement can be given substantive effect."). Thus, Miller's statement should have been admitted as substantive evidence.

Appendix C

c.

The government maintains that Brink is not entitled to a new trial because the district court's error, if any, was harmless. Like resolution of Brink's Sixth Amendment claim, resolving this issue depends on whether Scott was acting as a government agent while collecting information on Brink.

Under Federal Rule of Criminal Procedure 52(a) "any error, defect or variance which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 52(a) (West 1994). An error that does not implicate a constitutional right is harmless where it is " 'unimportant in relation to everything else the jury considered on the issue in question as revealed in the record.' " *United States v. Palmieri*, 21 F.3d 1265, 1273 (3d Cir. 1994), *petition for cert. filed* Aug. 1, 1994 (No. 94-5463) (quoting *Yates v. Evatt*, 500 U.S. 391, 403 (1991)). Upon reviewing the entire record, we believe that, provided Scott's testimony was properly admitted at trial, the district court's error was harmless.

Scott testified that, when they were cellmates, Brink confessed to the robbery. The bank tellers, Miller and Simpson, made positive in-court identifications[11] and Brink's

---

11. Simpson testified:

Q: How do you know that Billy Brink robbed you on December 16 1992?

A: I could tell who he was. I could see through the ski mask. The holes around the eyes and the mouth were big enough to see. I could recognize

(Cont'd)

friend, William Rumbarger, testified that on the evening after the robbery, he saw Brink carrying two, three-quarter inch

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(Cont'd)

his features, his voice, the way he walked, his mannerisms.

Q: Now you have identified several characteristics. Did you know Billy Brink prior to December 16, 1992.

A: Yes I did.

Q: And how was it that you knew him or knew of him?

A: I knew of him all his life. My son coached him in midget football, I think junior high, and probably varsity football also. But, I just know that he — you know, I have known of him.

Q: Now, was he a customer of the Farmers National Bank?

A: Yes, he was.

Q: When was the last time you had seen him in the bank prior to December 16th.

A: Probably around the first week in December he was in the bank.

Appendix at 94.

(Cont'd)

stacks of cash in large denominations. These, together with other circumstantial evidence, provide sufficient evidence of Brink's guilt.[12]

(Cont'd)
Miller testified:

> Q: And how is it that you were able to identify [Brink]?
>
> A: Just — when he came to the window, it was him. I mean, from what I know of him and seen of him, it was Bill Brink.

Appendix at 110.

> Q: [Y]ou knew him because one of his friends was dating your best friend. Is that how you knew him?
>
> A: That's how I knew who he was at first, yes.
>
> Q: And then you also saw him play football. Is that what your testimony is?
>
> A: Yeah. I saw him play football and, I mean, we went to two small high schools. I mean, everybody knew who everybody was in the two schools.

Appenidix at 114.

12. Claiming the pre-trial identifications of Miller and Simpson were subject to the same limiting instruction as Miller's statement regarding the robber's eye color, the government contends the jury was instructed not to view

(Cont'd)

Appendix C

If Scott did not violate Brink's Sixth Amendment rights his testimony was properly allowed into evidence. *See Kuhnmann*, 477 U.S. at 459 (evidence gained by luck or happenstance does not violate defendant's right to counsel). In that case, any error regarding the identification was harmless because Brink's confession coupled with the in-court identification and the circumstantial evidence provides sufficient evidence of his guilt. On the other hand, if Brink's rights were violated he is entitled to a new trial on that basis alone, *see supra* note 9, and we would not need to reach the evidentiary issue. Consequently, we hold that if, after an evidentiary hearing, the district court determines Scott did not violate Brink's Sixth Amendment rights, the district court's failure to admit Miller's statement of prior identification was harmless error.[13]

(Cont'd)
their testimony as substantive evidence, but instead to use it to judge their credibility. Consequently, the government maintains that limiting the use of Miller's statement about the robber's eye color, if error, was harmless because the court's instruction hurt the government's case more than the defendant's. Although we find the government's argument unconvincing, we agree the error was harmless.

13. Brink raises two other issues on appeal. He claims the district court erred by not interrupting jury deliberations to allow him to demonstrate that the denim jacket, taken from his home and entered into evidence on the theory that it was worn during the robbery, did not fit him. After jury deliberations begin, a district judge has wide discretion in deciding whether to reopen a case. *United States v. Golomb*, 754 F.2d 86, 89 (2d Cir. 1985); *see Drummond v. United States*, 350 F.2d 983, 991 (8th Cir. 1965) (Blackmun J.), *cert. denied sub nom. Castaldi v. United States*, 384 U.S. 944 (1966). The court denied Brink's request because he offered no excuse for failing to raise the issue earlier, and because it believed interrupting deliberations might suggest to the jurors that the jacket was more important than other pieces of evidence. We find no abuse of discretion here. *See Fernandez v. United States*, 329 F.2d 899, 903 (9th Cir.),
(Cont'd)

Appendix C

IV. Conclusion

For the foregoing reasons, we will vacate the judgment of the district court and remand this case for further proceedings not inconsistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(Cont'd)
cert. denied, 379 U.S. 832 (1964); *cf. United States v. Burger*, 419 F.2d 1293, 1295 (5th Cir. 1969) (trial court should exercise its discretion with caution).

Brink also contests the district court's ruling that allowed two experts to testify about similarities between items seized from Brink's home and those identified on the bank's surveillance photographs. Brink argues that because these experts were unable to testify to a reasonable degree of scientific certainty, their testimony should have been stricken as conjecture. We find no merit in this argument. The decision whether to admit expert testimony is within the broad discretion of the trial court, *United States* v. *Downing*, 753 F.2d 1224, 1229 (3d Cir. 1985); *United States v. Cyphers*, 553 F.2d 1064, 1072 (7th Cir.), *cert. denied*, 434 U.S. 843 (1977), and a court generally does not abuse its discretion where the expert bases its opinion on the type of data a reasonable expert in the field would use in rendering an opinion on the subject at issue, *see Deluca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 955 (3d Cir. 1990); *see also* Michael H. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. Ill. L. Rev. 43 (reasonable degree of scientific certainty refers to whether the expert relied on a theory accepted by a recognized segment of the particular field to which the expert belongs); *cf. Cyphers*, 553 F.2d at 1072-73 ("[A]n expert's lack of absolute certainty goes to weight of testimony, not its admissibility."); *Stutzman v. CRST, Inc.* 997 F.2d 291, 296 (7th Cir. 1993).

APPENDIX D — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 27, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3397

UNITED STATES OF AMERICA

v.

WILLIAM HARRY BRINK,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Criminal No. 93-00035)

Present: Becker, Mansmann and Scirica, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on April 13, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 30, 1993, be, and the same is hereby vacated and the cause is remanded to the District Court for further proceedings not inconsistent with the opinion of this Court. All of the above in accordance with the opinion of this Court.

Appendix D

ATTEST:

s/ Bradford A. Baldus
Chief Deputy Clerk

Dated: October 27, 1994

Certified as a true copy and issued in lieu
of a formal mandate on November 18, 1994.

Teste: s/ P. Douglas Sisk
Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX E — JUDGMENT AND SENTENCE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED JULY 30, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Case Number CR 93-95

UNITED STATES OF AMERICA

v.

WILLIAM HARRY BRINK

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

Alexander Lindsay, Esquire
Defendants's Attorney

THE DEFENDANT:

* * *

XX was found guilty on count(s) 1, 2 and 3 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Appendix E

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 2113(a)	Bank Robbery	12-16-93	1
18 USC 2113(d)	Armed Bank Robbery	12-16-93	2
18 USC 924(c)(1)	Use of Firearm during Crime of Violence	12-16-93	3

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

XX It is ordered that the defendant shall pay to the United States a special assessment of *$150.00*, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
174-55-0776
Defendant's Date of Birth
12-21-70

July 30, 1993
Date of Imposition of Sentence

Appendix E

Defendant's mailing address:

RD1, Box 302A
East Brady, PA 16028

s/ Alan N. Bloch
Signature of Judicial Officer
Alan N. Bloch, United States District Judge

Defendant's residence address:
same as above

7/30/93
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of one-hundred and one (101) months. This term consists of terms of 41 months on Counts 1 and 2, and a term of 60 months on Count 3, to be served consecutively.

XX The Court makes the following recommendations to the Bureau of Prisons:

that the designated instutition be close to his place of residence.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years.

Appendix E

While on supervised release, the defendant shall not commit another Federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

XX The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

* * *

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

Appendix E

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

Appendix E

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history of characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

STATEMENT OF REASONS

XX The court adopts the factual findings and guideline application in the presentence report.

* * *

XX Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: $4430.00

XX Full restitution is not ordered for the following reason(s): due to defendant's inability to pay.

* * *

Appendix E

XX The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

* * *

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED JUNE 8, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 93-35

UNITED STATES OF AMERICA

vs.

WILLIAM HARRY BRINK,

Defendant.

ORDER

AND NOW, this 8th day of June, 1993, upon consideration of Defendant's Motion for New Trial (Document No. 30) filed in the above captioned matter on June 8, 1993,

IT IS HEREBY ORDERED that said Motion is DENIED.

s/ Alan N. Bloch
United States District Judge

cc: Asst. U.S. Atty. Mark Rush
633 U.S. Post Office & Courthouse, Pittsburgh, PA 15219

Alexander Lindsay, Jr., Esquire
408 North Main Street, Butler, PA 16001

APPENDIX G — VERDICT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 93-35

UNITED STATES OF AMERICA

versus

WILLIAM HARRY BRINK,

Defendant.

VERDICT

And now, to wit: *June 2, 1993,* we, the Jurors empaneled in the above-entitled case, find *the defendant as to Count 1: Guilty;*

as to Count 2: Guilty;

as to Count 3: Guilty.

1. s/ Allen L. Sattis
2. s/ Jennifer Young
3. s/ Herbert C. Bard
4. s/ John R. Andresky
5. s/ Gerri D. Laurito
6. s/ Richard D. Cercone
7. s/ Kenneth R. Wilt
8. s/ Sonya M. Drago
9. s/ Michael C. Sheahy
10. s/ Sue Ellen Suogger
11. s/ Linda D. Evans
12. s/ August L. Mersio